IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL JOSEPH KELLYWOOD,
Appellant.

No. 2 CA-CR 2017-0178
Filed December 12, 2018

Appeal from the Superior Court in Pima County
No. CR20153211001
The Honorable Richard Fields, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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OPINION

Presiding Judge Staring authored the opinion of the Court, in which Judge Brearcliffe concurred and Chief Judge Eckerstrom dissented.

S T A R I N G, Presiding Judge:

¶1 Michael Kellywood appeals from his convictions and sentences for three counts of sexual conduct with a minor under the age of fifteen, and one count each of molestation of a child, continuous sexual abuse of a child, and sexual abuse of a minor under the age of fifteen, all dangerous crimes against children. Kellywood argues the trial court erred by denying his motion to compel production of the victim's medical and counseling records for *in camera* review because they possibly contained exculpatory evidence. For the reasons that follow, we affirm Kellywood's convictions and sentences.

Factual and Procedural History

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). Beginning in 2012, Kellywood and his wife became foster parents to five siblings, whom they eventually adopted, including A.K. From 2012 to 2015, while A.K. was between eleven and fourteen years old, Kellywood sexually molested and assaulted her, for which he was eventually charged with multiple sexual offenses against her.

¶3 According to Kellywood's theory of defense, A.K. had recently fabricated her allegations, in part because he and his wife had taken away her cell phone after they discovered she had been using it to watch pornography. To support this theory, Kellywood filed a pretrial motion to compel the state to produce A.K.'s medical, Department of Child Safety (DCS), school, and counseling records, as well as her social media entries, computer searches, and text messages. Although Kellywood cited numerous legal authorities in his motion, he failed to develop any specific argument concerning his entitlement to production, merely asserting that, "All of the above records are necessary to defend Mr. Kellywood." Kellywood later withdrew the motion, and in a subsequent motion to compel production by the state, sought A.K.'s medical and counseling records for the period of time that she lived in his home. In that motion, he asserted: "[D]efense counsel needs possible exculpatory evidence which may be in the records of [A.K.'s] medical professionals and counselors. Oftentimes, these professionals directly ask questions concerning whether

or not someone has been sexually inappropriate with them." The court denied the motion.[1]

¶4 Following trial, the jury found Kellywood guilty as described above,[2] and the trial court sentenced him to life imprisonment, in addition to a combination of consecutive and concurrent prison terms totaling sixty years. The court also suspended imposition of his sentence for sexual abuse of a minor under fifteen, placing him on lifetime probation. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Motion to Compel

¶5 Kellywood argues the trial court erred by denying his motion to compel production of A.K.'s medical and counseling records. He asserts the presence of "sufficient indicia" that those records might contain statements with which he could impeach A.K. Specifically, as noted, he maintains the medical and counseling records might show that when directly asked, A.K. affirmatively denied experiencing inappropriate sexual contact during the relevant period of time. "A trial court has broad discretion over discovery matters, and we will not disturb its rulings on those matters absent an abuse of that discretion." *State v. Fields*, 196 Ariz.

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[1]The state argues Kellywood erroneously sought production from the state instead of directly from A.K. Under Rule 15.1(b) and (b)(8), Ariz. R. Crim. P., the state must "make available to the defendant . . . all existing material or information [in the state's possession or control] that tends to mitigate or negate the defendant's guilt." *See also Brady v. Maryland*, 373 U.S. 83, 87 (1963) (state suppression of exculpatory evidence violates due process). But this duty extends to material and information "in the possession or control of . . . the prosecutor" as well as "any law enforcement agency that has participated in the investigation of the case and is under the prosecutor's direction or control." Ariz. R. Crim. P. 15.1(f)(1), (2). Here, we assume without deciding that the documents in question were not in the possession or control of the state, but we nonetheless elect to address whether Kellywood was entitled to receive the records from A.K. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984) (general preference for resolving cases on merits).

[2]The jury acquitted Kellywood of one count of sexual conduct with a minor under the age of fifteen.

580, ¶ 4 (App. 1999). An error of law is an abuse of discretion. *State v. Burgett*, 226 Ariz. 85, ¶ 1 (App. 2010).

¶6 The trial court denied Kellywood's motion to compel "for various reasons, including [it]s concern that [the] circumstances of this kind of case [do] not mean that any negative responses to alleged providers [about inappropriate sexual contact] would necessarily be exculpatory." To the extent that this reflects a conclusion by the court that, as a matter of law, prior statements in which A.K. had denied experiencing inappropriate sexual contact could not possibly be exculpatory, we disagree. *See Exculpatory Evidence*, Black's Law Dictionary (10th ed. 2014) ("exculpatory evidence" is "[e]vidence tending to establish a criminal defendant's innocence"). It is possible that A.K., or any other similarly situated victim, could say something exculpatory to a care provider. However, as discussed herein, the mere possibility A.K. could have said something exculpatory is not, as a matter of law, sufficient by itself to require her to produce the medical and counseling records sought by Kellywood.

Victims' Rights

¶7 Under Arizona's Victims' Bill of Rights, a crime victim possesses a constitutional right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. II, § 2.1(A)(5); *see also* Ariz. R. Crim. P. 39(b)(12) (crime victim entitled "to refuse [a] . . . discovery request by the defendant[or] the defendant's attorney"). Thus, "[g]enerally, the victim of a crime has the right to refuse to hand over medical records . . . ." *State v. Sarullo*, 219 Ariz. 431, ¶ 20 (App. 2008); *see also State ex rel. Romley v. Superior Court (Roper)*, 172 Ariz. 232, 237 (App. 1992) (§ 2.1(A)(5) encompasses medical records). In addition, "pursuant to the physician-patient privilege, a defendant may not seek to establish a victim's character trait through the testimony of the victim's doctor, or psychologist, or by using the victim's medical records without the victim's consent." *State v. Connor*, 215 Ariz. 553, ¶ 18 (App. 2007); A.R.S. § 13-4062(4) (physician-patient privilege); A.R.S. § 32-2085(A) (psychologist-patient privilege).

¶8 A victim's right to refuse discovery is not absolute, however. *Sarullo*, 219 Ariz. 431, ¶ 20. "Due process requires that the defendant receive 'a meaningful opportunity to present a complete defense.'" *Connor*, 215 Ariz. 553, ¶ 12 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). And, "when the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner . . . then due

process is the superior right." *Roper*, 172 Ariz. at 236 (excluding "essential evidence, thereby precluding a defendant from presenting a theory of defense . . . results in a denial of . . . due process that is not harmless"). Thus, a victim may be compelled to produce treatment records for *in camera* inspection if the defendant shows a "reasonable possibility that the information sought . . . include[s] information to which [he or] she [is] entitled as a matter of due process." *Sarullo*, 219 Ariz. 431, ¶ 20 (quoting *Connor*, 215 Ariz. 553, ¶ 10) (alteration in *Sarullo*).

¶9 We therefore turn to the question of whether Kellywood demonstrated a "reasonable possibility" that the medical and counseling records he sought would contain evidence to which he was entitled as a matter of due process. *Id.* ¶ 20. In light of the competing constitutional interests, as well as the ordinarily privileged nature of patient-provider communications, we conclude the burden of demonstrating a "reasonable possibility" is not insubstantial, and necessarily requires more than conclusory assertions or speculation on the part of the requesting party. *See Fields*, 196 Ariz. 580, ¶ 7 (discovery request anchored in speculation when motivated only by "conclusions, surmise, and conjecture"); *see also State v. Hatton*, 116 Ariz. 142, 150 (1977) ("[M]ere conjecture without more that certain information might be useful as exculpatory evidence is not sufficient to reverse a trial court's denial of a request for disclosure.").

¶10 Here, Kellywood has not demonstrated a reasonable possibility that the medical and counseling records he seeks contain exculpatory information. As noted above, in his motion to compel, he merely asserted: "[D]efense counsel needs possible exculpatory evidence which may be in the records of [A.K.'s] medical professionals and counselors. Oftentimes, these professionals directly ask questions concerning whether or not someone has been sexually inappropriate with them." However, neither in this court nor in the trial court, has Kellywood ever identified a medical treatment provider or counselor that saw A.K., or for that matter any specific condition for which A.K., his daughter, was receiving treatment or counseling. Moreover, there is no evidence in the record concerning the standard of care applicable to when and under what circumstances physicians and counselors should inquire about whether someone has suffered sexual abuse, or whether and how such inquiries are routinely made. Kellywood's assertions amount to nothing more than speculation that there might be something in records somewhere. He thus fails to demonstrate the "reasonable possibility" contemplated in *Sarullo*. 219 Ariz. 431, ¶ 20; *see also Connor*, 215 Ariz. 553, ¶ 11 ("Defendant presented no sufficiently specific basis to require that the victim provide medical records to the trial court for an *in camera* review."). Indeed, were

we to conclude that Kellywood had demonstrated a "reasonable possibility" on the basis of such speculation, the effect would be to compel production of medical and counseling records in virtually any case in which a defendant accused of sexual offenses claims fabrication; the exception would swallow § 2.1(A)(5) of the Victims' Bill of Rights.[3]

¶11 Further, neither *Roper* nor *Connor* supports the view that the Victims' Bill of Rights must give way in every case in which a defendant merely articulates some plausible reason why treatment records might contain something exculpatory. In *Roper*, the state charged the defendant with aggravated assault against her husband. 172 Ariz. at 234. Asserting she had acted in self-defense when her husband experienced a violent psychiatric episode, the defendant moved to compel production of his medical records, including records arising from "psychiatric treatment over the years for a multiple personality disorder."[4] *Id*. Her husband had several prior arrests for assaulting her, and, only two years earlier, had been convicted for assaulting her in Florida. *Id*. Further, she had been present with her husband during some of the psychiatric sessions in question. *Id*. at 235. Thus, *Roper* involved far more specificity concerning the existence of records and their contents than exists here.

¶12 In *Connor*, we discussed the scope and limitations of *Roper*. 215 Ariz. 553, ¶¶ 7–10. There, Connor appealed his conviction for first-degree murder, asserting that "the trial court erred by denying his pretrial motion for production of the victim's medical records." *Id.* ¶ 1. The victim, "an intellectually and emotionally challenged young man," had been stabbed to death. *Id*. ¶ 2. Connor ultimately admitted the stabbing, but claimed self-defense. *Id*. ¶ 3. He brought a pre-trial motion "to compel discovery of 'any and all medical treatment, counseling, psychological

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[3] Kellywood makes sweeping, unsupported assertions concerning children who have been in foster care and involved in parental termination proceedings, including: "Such an experience is not without trauma to the children, and more often than not, children such as A.K. experience behavioral issues which can include lying or manipulative behavior designed to gain attention." We are unpersuaded by the stereotyping of children who have been involved in child welfare proceedings.

[4] "The defendant, not the victim, [had] made the '911' call to the police at the time of the alleged incident, asking for help . . . because her husband was beating her and threatening her with a knife." *Roper*, 172 Ariz. at 237.

and/or psychiatric records' of the victim[,]" claiming that such information "may be exculpatory and will likely solidify the [d]efendant's position that the decedent was the initial aggressor." *Id.* ¶ 4.

¶13 We concluded Connor had "presented no sufficiently specific basis to require that the victim provide medical records to the trial court for an *in camera* review." *Connor*, 215 Ariz. 553, ¶ 11. We also noted *Roper* "did not authorize a wholesale production of the victim's medical records to the defendant." *Id.* ¶ 8. Addressing the limited scope of *Roper*, we wrote:

> [W]e authorized some infringement, limited to the extent required by the nature of an *in camera* review, on both the victim's right to be free of discovery under the Victim's Bill of Rights and the victim's physician-patient privilege in any documents in which that right had not been waived. Nevertheless, we did so in the context of a reasonable possibility that the information sought by the defendant included information to which she was entitled as a matter of due process, and to which her victim husband had arguably waived his physician-patient privilege as to her by including her in some of his treatment sessions. We, thus, merely recognized the possibility that due process could override other rights, that some privilege might have been waived, and then authorized the trial court to weigh these competing rights after considering the evidence and the defendant's need for it in presenting her defense.

Id. ¶ 10 (citation omitted); *see also Sarullo*, 219 Ariz. 431, ¶¶ 19-20 (defendant seeking "information relating to [victim's] 'inability to carry on healthy productive relationships,' any changes in her prescription medication around the time of the incident, and her discussions of the incident with her counselor" failed to present "sufficiently specific basis for requiring" production of medical records).

¶14 We are unpersuaded by our dissenting colleague's suggestion that the intrusiveness of Kellywood's request is acceptable because he only seeks *in camera* review by a trial judge required to maintain the confidentiality of A.K.'s records. Notably, both *Connor*, 215 Ariz. 553, ¶ 11, and *Sarullo*, 219 Ariz. 431, ¶¶ 20-21, resulted in conclusions that the

defendants had made showings insufficient to require production for *in camera* review. Thus, the fact Kellywood seeks *in camera* review is not distinguishing. Further, consistent with *Connor* and *Sarullo*, we conclude that even disclosure for *in camera* review by a trial judge represents a significant intrusion into a victim's confidential records. *See State v. Pinder*, 678 So. 2d 410, 415 (Fla. Dist. Ct. App. 1996) (disclosure of sexual assault counseling records for *in camera* review by trial judge intrudes on victim's rights).[5]

¶15 Accordingly, we conclude the trial court did not abuse its discretion by refusing Kellywood's motion to compel production of A.K.'s medical and counseling records for *in camera* review.

Withdrawn Motion to Compel

¶16 Kellywood also argues on appeal that he was entitled to A.K.'s DCS records, school records, search history, Facebook entries, and text messages. He argues this information "would have addressed issues with A.K.'s credibility as an accuser." Kellywood, however, withdrew the motion requesting that information. Thus, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90 (1984)) (fundamental error is "error going to the foundation of the case . . . that takes from the defendant a right essential to his defense, and . . . of such magnitude that [he] could not possibly have received a fair trial"); *see also State v. Escalante*, 245 Ariz. 135, ¶ 16 (2018) ("[T]he appropriate standard for fundamental error under *Henderson* is disjunctive."). With respect to all but A.K.'s DCS records, the court was under no obligation to order the state to acquire, produce, or create records that were not in its possession or control—particularly in the absence of a pending motion. *See* Ariz. R. Crim. P. 15.1(b); *State v. Rienhardt*, 190 Ariz. 579, 585-86 (1997). Accordingly, we find no error concerning this request. *See Henderson*, 210 Ariz. 561, ¶ 19.

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[5]Our colleague also emphasizes that five of the six counts on which Kellywood was convicted "were supported by no direct evidence other than A.K.'s testimony." But some elaboration is warranted. The sixth count (actually Count Four) arose from Kellywood having sexual intercourse with A.K. on the carpet in a vacant home where Kellywood had been doing remodeling work. Police later obtained a DNA match to Kellywood from a semen stain on the carpet, as well as a biological sample consistent with A.K.'s DNA.

¶17 Further, assuming without deciding that the DCS records were in the possession or control of a state agency, they would have been subject to disclosure only insofar as Rule 15.1(b) required it—whether because they contained exculpatory information or otherwise. Nothing in this case indicates the DCS records, which pertain to the child welfare proceedings that resulted in A.K.'s placement in Kellywood's home, and which did not arise from the allegations against him, contained any material, exculpatory information whatsoever. *See Brady*, 373 U.S. at 87. Because there is no basis to conclude that the state failed to comply with its obligations under *Brady* or Rule 15.1(b), we cannot say error, fundamental or otherwise, exists. *See Henderson*, 210 Ariz. 561, ¶ 19.

Disposition

¶18 For the foregoing reasons, we affirm Kellywood's convictions and sentences.

E C K E R S T R O M, Chief Judge, dissenting:

¶19 In evaluating what a defendant must show to secure disclosure in practice, we must be mindful that a finding of "reasonable possibility" does not itself result in disclosure of the victim's medical and counseling records. Such a finding triggers only an *in camera* inspection by the judge: a professional who possesses a solemn duty to protect the confidentiality of those materials. *See* Ariz. R. Sup. Ct. 81, Ariz. Code of Judicial Conduct 3.5 ("A judge shall not intentionally disclose . . . nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.").

¶20 In tension with the victim's interest in preventing the inspection of those records by a lone judge stands the defendant's right to due process, protected by the Fifth and Sixth Amendments to the Constitution, to collect and present all exculpatory evidence in his favor. *See Roper*, 172 Ariz. at 236 (when defendant's due process right to present a complete defense directly conflicts with Victims' Bill of Rights, "due process is the superior right").[6] Thus, while the defendant's access to exculpatory information stands central to the reliability and fairness of a criminal trial, the victim's interest in the privacy of her medical and

[6]That interest is especially acute where, as here, a defendant faces life imprisonment if found guilty and where many of the criminal counts turn largely on the credibility of the alleged victim.

counseling records is substantially protected by the threshold requirement of *in camera* review.

¶21 Our courts have resolved this asymmetry by setting forth a comparatively relaxed standard for compelling *in camera* review: the defendant need only show a "reasonable possibility" such evidence might be found in the requested documents. *Sarullo*, 219 Ariz. 431, ¶ 20 (quoting *Connor*, 215 Ariz. 553, ¶ 10).

¶22 Although litigants may dispute what constitutes a "reasonable possibility" of discovering relevant information, that standard, as my colleagues correctly observe, necessarily requires more than speculation on the part of the requesting party. Accordingly, when a defendant's request amounts to "mere conjecture without more that certain information might be useful as exculpatory evidence," a trial court properly refuses to compel disclosure. *State v. Hatton*, 116 Ariz. 142, 150 (1977) (request for police reports of criminal activity over year-long period in hope of finding alternate suspect a "fishing expedition").

¶23 On the other hand, almost all disclosure requests, including well-founded ones, involve some measure of speculation: without possession of the requested documents, no litigant can be certain what information they will contain. This is presumably why our rules and jurisprudence refer to the process of seeking information as "discovery" and "disclosure." *See, e.g.*, Rule 15.1; *cf.* Ariz. R. Civ. P. 26 (governing civil discovery). Thus, a "reasonable possibility" that documents may contain exculpatory evidence stands on a spectrum between abject conjecture and certainty.

¶24 But the "reasonable possibility" standard gives us more guidance than that. Semantically, a "reasonable possibility" does not require a showing that relevant evidence will probably be discovered: a possibility is logically something less than a probability. Thus, the distinction between a disclosure request based on speculation and one that is anchored in a reasonable possibility turns on whether a reasoned basis supports the request—and not whether the requesting party can establish it is likely that any relevant information will be found. *See Sarullo*, 219 Ariz. 431, ¶ 21.

¶25 Under that standard, I can only conclude that Kellywood—a man who faced lifetime imprisonment and whose guilt on most counts depended largely on the credibility of A.K.—provided a reasoned basis to believe exculpatory evidence could possibly be found within A.K.'s

medical and counseling records. In his motion and argument for disclosure, he either expressly asserted or logically implied that (1) medical providers for an adolescent girl might reasonably be expected to ask A.K. about her level of sexual activity and (2) counselors for a recently adopted child might reasonably be expected to inquire about the nature of her relationship with her adoptive father.[7] Kellywood further deduced that any responses provided by A.K. to such queries would necessarily be exculpatory because (1) no counselor or physician had officially reported any allegation of sexual relations between Kellywood and A.K. and (2) they would have been legally required to do so as a matter of law. *See* A.R.S. § 13-3620(A)(1). To further increase the possibility that his request would target exculpatory information, Kellywood narrowed his request to those counseling sessions or doctors' appointments bounded by the timeframe during which A.K. claimed the crimes were ongoing.

¶26 In my view, the above demonstrates a reasoned basis, beyond mere conjecture, to believe that A.K.'s medical and counseling records might plausibly contain exculpatory information. This is all that is required for a defendant facing felony charges and who seeks only *in camera* review.

¶27 My colleagues maintain that allowing such review here would necessarily require disclosure whenever a defendant "merely articulates some plausible reason" the requested materials might contain exculpatory evidence. But if that "plausible reason" truly establishes a possibility based in sound logic that the materials could contain exculpatory information, then limited disclosure by *in camera* review is precisely what our legal standard requires.

¶28 The majority warns that the due process exception would swallow § 2.1(A)(5) of the Victims' Bill of Rights if we applied it here because it would compel such review "in virtually any case" when the

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[7] These logical intuitions find support in published medical standards. *See, e.g.*, *Preventing, Identifying and Treating Violence and Abuse*, AMA Code of Medical Ethics Opinion 8.10, https://www.ama-assn.org/delivering-care/preventing-identifying-treating-violence-abuse (last visited Nov. 21, 2018) (physicians have ethical obligation to "[r]outinely inquire about physical[and] sexual abuse . . . as part of the [patient's] medical history"); Rachel Katzenellenbogen, *HEADSS: The "Review of Systems" for Adolescents*, 7 AMA J. Ethics 231-33 (2005) (enumerating risks for which medical providers should screen adolescent patients, including unwanted sexual activity and general safety).

defense is fabrication. But, in so concluding, my colleagues overlook the unique features of this case. Here, we address disclosure in the context of allegations of persistent sexual assault over a period of years during which the victim saw medical and counseling providers on numerous occasions.

¶29 By contrast, we can envision a multitude of circumstances in which *in camera* review may not be appropriate: when, by contrast, the alleged crime constituted a single event or occurred within a time period during which the victim saw no providers; when other evidence affirmatively indicates the records will not contain exculpatory information, *see, e.g.*, *Sarullo*, 219 Ariz. 431, ¶¶ 19–21; when a victim has made prior inconsistent statements such that the requested information would be cumulative or not material under the Sixth Amendment, *see State v. Bracy*, 145 Ariz. 520, 528 (1985); when a request pertains to an irrelevant time period; or when records are prepared by a specialist providing irrelevant forms of treatment (e.g., a podiatrist).

¶30 I fear the majority's analysis essentially requires Kellywood to demonstrate a substantial probability that A.K.'s records would reveal exculpatory information. Indeed, it implies that a defendant must make a showing equivalent to that provided in *Roper* and it enumerates the numerous, extraordinary circumstances present in that case. *See* 172 Ariz. at 234-35. But the court in *Roper* did not suggest that the defendant there had narrowly established a reasonable possibility or that the facts of that case made the question close or difficult. Rather, given the defendant's exceptional knowledge about the victim's psychiatric sessions—which came from her personal involvement therein, *see id.*, it is clear she could have satisfied a burden far exceeding reasonable possibility.

¶31 By contrast, in *Connor*, we rejected the defendant's request for disclosure where he articulated no basis to believe that the deceased victim's medical or psychological records would provide any insight on whether "an intellectually and emotionally challenged young man" had been the original aggressor in his own death. *See* 215 Ariz. 553, ¶¶ 2, 11. Nor did the defendant offer any reason to believe the records might contain material necessary to "fully present his justification defense or to the cross-examination of witnesses." *Id.* ¶ 11. Instead, he sought disclosure of all records so that he could have an expert review them and offer an opinion. *Id.* ¶ 23. Additionally, that request was beset with other problems: notably, the defendant could not establish the grounds upon which such character evidence, if found, would be admissible. *Id.* ¶¶ 13, 15, 18. Here, the statements sought by Kellywood would not have been subject to further

evidentiary hurdles. They would have been plainly admissible as prior inconsistent statements. *See* Ariz. R. Evid. 613.

¶32 In *Sarullo*, the facts likewise strongly indicated exculpatory statements would not be found. 219 Ariz. 431, ¶¶ 19–21. There, as here, the defendant sought inconsistent statements in the counseling records of an assault victim. 219 Ariz. 431, ¶ 21. But because the victim's account of the incident had remained consistent from immediately after the event through trial, we reasoned there was no basis to believe her records would show otherwise. *Id.* By contrast, Kellywood identified a concrete basis to believe A.K.'s records might contain exculpatory statements: A.K. would plausibly have been asked about her sexual conduct or her relationship with Kellywood and the absence of any statutorily required notification by her caregivers suggested that any answer could only be exculpatory.

¶33 Thus, a finding that Kellywood has established a reasonable possibility can be readily harmonized with those cases where we have previously concluded that a defendant has not cleared that threshold. Further, *Connor* and *Sarullo* concretely demonstrate that faithful application of the "reasonable possibility" standard does not require the court to grant *in camera* review in every case where a defendant seeks the medical and counseling records of an alleged victim.

¶34 The majority emphasizes that Kellywood never "identified a medical treatment provider or counselor that saw A.K., or for that matter any specific condition for which A.K. . . . was receiving treatment or counseling." But Kellywood did establish that A.K. had seen such providers. More granular information, while helpful, is not necessary to establish a reasonable possibility. The critical fact is that A.K. had seen providers; knowing their identity does not make the fact of treatment any more probable. And, although Kellywood did not articulate the specific conditions for which A.K. had obtained treatment, such conditions were not crucial to support Kellywood's basis for believing he might reasonably find exculpatory information.[8] Rather, Kellywood sought questions and answers arising from general screening. Furthermore, we would presume an uncommon degree of communication between a girl and her adoptive

[8]Kellywood indicated through trial testimony that A.K.'s counseling sessions were designed to assist her in integrating with her new family—a topic area that might readily prompt discussions about any inappropriate conduct by her adoptive father.

father to insist that the father know every feature of the highly sensitive and embarrassing subjects of her medical and counseling appointments.

¶35 Kellywood has been accused and convicted of serious, repugnant crimes. And, our state's laws express our society's outrage by reserving some of our most unforgiving punishments of incarceration for those who so victimize children. *See* A.R.S. § 13-705. Indeed, Kellywood has received a sentence of life imprisonment followed by sixty years in prison for his conviction here. It is for those very reasons that we must be vigilant to provide those charged with the full measure of due process commanded by our federal and state constitutions: to have a fair opportunity to demonstrate that they have not committed such crimes.

¶36 Here, both parties concede that Kellywood's offenses allegedly occurred in the presence of no witnesses other than Kellywood and A.K. Thus, the case turned in substantial part on the respective credibility of those two individuals. Indeed, of the six counts on which Kellywood was convicted, five were supported by no direct evidence other than A.K.'s testimony. Under such circumstances, I find it unsettling that Kellywood was denied access to potential evidence that might have borne directly on A.K.'s credibility and could conceivably have generated reasonable doubt about Kellywood's guilt on at least five of the counts. Because, in my view, he has demonstrated a reasonable possibility that A.K.'s medical and counseling records might contain such evidence, I would reverse the trial court, order it to conduct an *in camera* review of those records and to conduct, if necessary, any other proceedings in accordance with the result of that review.